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The Execution of Wills in California.

(CONCLUDED FROM JULY ISSUE.)

VII.

AN attested will must, of course, be in writing.⁸³ Although wills are frequently acknowledged before notaries public, there is no significance in having a notarial acknowledgment attached thereto.⁸⁴

The following are the prerequisites of an attested will:⁸⁵ (1) It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction, must subscribe his name thereto. (2) The subscription must be made in the presence of the attesting witnesses or be acknowledged by the testator to them to have been made by him or by his authority. (3) The Testator must, at the time of subscribing or acknowledging the same declare to the attesting witness that the instrument is his will. (4) There must be two attesting witnesses, each of whom must sign the same as a witness, at the end of the will, at the testator's request and in his presence.

No will made out of the state is valid as a will in this state, unless executed according to the law of this state, except that a will made in a state or country in which the testator is domiciled at the time of his death and valid under the law of such state or country, will be regarded as valid in this state, so far as the same relates to personal property, with the further restrictions, concerning charitable devises and bequests, already above noted.⁸⁶

An attested will must be "subscribed at the end." A very evident purpose of requiring the testator's name to be subscribed at the end of the will is, not only that it may thereby appear upon the face of the instrument that the testamentary purpose which is expressed therein is a completed act, but also to prevent any opportunity for fraudulent or other interpolations between the written matter and the signature. The "end" of a document offered as a will is not, necessarily, the foot or physical end of the

⁸³ Cal. Code Civ. Proc., § 1969, Cal. Civ. Code, § 1276.

⁸⁴ Cal. Code Civ. Proc., § 1948.

⁸⁵ Cal. Civ. Code, § 1276.

⁸⁶ Cal. Civ. Code, §§ 1275, 1313.

sheet or sheets of paper upon which the "will" is written, but is the physical termination of the testamentary provisions which constitute the will.⁸⁷ The requirement that the name shall be subscribed at the end of the will is not satisfied by having the name written at any place after the termination of the written matter, irrespective of the relation which such place bears to the concluding portion of the will; nor does the language require that the subscription be in immediate juxtaposition with the concluding words of the instrument, but that it shall

"be so near thereto as to afford a reasonable inference that the testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes. It must appear upon the face of the instrument not only that he intended to place it at the end of his testamentary provisions, but that he has in fact placed it in such proximity thereto as to constitute a substantial compliance with this requirement of the statute."

The true test

"to determine whether a decedent has subscribed his name at the end of a will is to take the document as it left his hand, and then, disregarding the signatures of the witnesses, and all evidence *aliunde*, to see whether it is apparent that his name was placed where it appears for the purpose of execution."⁸⁸

A deceased⁸⁹ wrote his name to an instrument at the end of that part of the paper making disposition of his estate and before the clause appointing an executor. The subscribing witnesses signed their names at the same place. It was claimed that the whole paper was invalid as a will, since the statute required that a will should be subscribed at the end thereof and a clause appeared after the signature showing that the paper was not subscribed "at" the end. The court held that since the subscription by the testator was made "at the end of the disposing part" and since a will may be made which does not appoint an executor, "the portions of the paper preceding the signature constitute a complete will and can be admitted to probate and an administrator with the will annexed appointed."

In the Estate of Blake,⁹⁰ the will was written on a blank form. After the testamentary provisions, there was a blank space of

⁸⁷ Estate of Seaman (1905), 146 Cal. 455, 80 Pac. 700.

⁸⁸ See concurring opinion of C. J. Beatty, Estate of Seaman, *supra*, n. 87.

⁸⁹ Estate of McCullough (1875), Myr. Prob. Rep. 76.

⁹⁰ (1902), 136 Cal. 306, 68 Pac. 827.

more than half a page on which there was no writing or printing. On the following page, under the heading "Lastly," the provision as to the appointment of the executrix was made; then followed the clause "In witness whereof," etc., and then the name "Thomas M. Blake." The court held that the will was signed "at the end thereof" within the meaning of the statute. It said:

"There is no provision as to the disposition of property or provision of any other kind after the name of the testator. The name was signed at the end but not immediately at the end of the testamentary provisions. It was not necessary for the signature to have been on the first or second line below the testamentary clauses."

In the Estate of Seaman,⁹¹ the instrument offered as the last will and testament of the deceased was written upon a printed form or blank consisting of four pages folded in the middle like ordinary legal cap. Upon the upper portion of the first page was a printed heading or introduction, occupying about one quarter of the page; in the printed form the remainder of that page and the entire second page were left blank. The dispositive parts of the will were written upon the blank portion of the first page and on one fourth of the blank portion of the second page, and at the close thereof a line was drawn in red ink transversely to the bottom of the second page. At the top of the third page there was printed a form for the appointment of the executor and a clause revoking all former wills. Immediately after this there was a testimonium clause, underneath which and extending to a little below the middle of the page, was printed an attestation clause. The blanks left for the name of an executor and for the attestation of the will were left unfilled. The remainder of the third page and the first or upper half of the fourth page were blank. The printed form was prepared to be twice folded from the bottom to the top, and across the face of the paper as thus folded and at the top thereof, were the printed words: "The last will and testament of" under which the scrivener had written "Henry Seaman." Blank forms for a date and for filing the instrument with the clerk were printed underneath this, the whole occupying the upper half of this outside face of the paper when folded. Underneath this printed matter was written "Henry Seaman" and underneath that, the names "M. O. Wyatt, J. H. Wright." The remainder of the fourth page was blank. It was

⁹¹ *Supra*, n. 88.

shown at the hearing that the decedent had written his name at that place in intended execution of his will and that at his request Messrs. Wyatt and Wright had signed their names as witnesses thereto. In accordance with the rules above set forth, the court held that the will was not subscribed "at the end" thereof by the testator.

In the main opinion it was said that

"while a slight space such as a single line, or even more, might be left blank between the written matter and the name without impairing the validity of the will, yet, to leave blank an entire page between the two would indicate a disregard of the requirements of the statute, whether resulting from ignorance or intention, which should prevent its admission to probate."

In a concurring opinion by Justice Angelotti, it is suggested that,

"The mere extent of space between the termination of a will and the subscription ought not to affect the question as to whether the statute has been complied with, if the document, on its face, disregarding the signatures of the witnesses and all outstanding evidence fairly indicates that the name was so placed by the testator as a subscription and for the purpose of execution. The extent of space is, of course, material upon the question as to what the document does indicate upon its face."

In the *Estate of Hartter*,⁹² the instrument offered as the will of the deceased consisted of one page, the upper portion of which constituted the disposing part of the will; then followed the attestation clause. The line provided for the signature of the testator was blank. The deceased, however, signed his name below the line provided therefor, in a blank space in the attestation clause. One of the subscribing witnesses testified that the deceased wrote his name in the blank space of the attestation clause in the presence of both the subscribing witnesses and that he declared to them that the document was his will and that he requested them both to sign their names as witnesses, which they did in his presence and in the presence of each other. The court held that the instrument was subscribed "at the end thereof," since it appears that the testator intended his subscription to be at the end of the docu-

⁹² (1914), 6 Coffey's Prob. Dec., 293.

⁹³ Noon's Will, 31 Misc. 420, 65 N. Y. Sup. 568; Gibson's Will, 128 App. Div. 769, 113 N. Y. Sup. 266; Younger v. Duffie, 94 N. Y. 535, 46 Am. Rep. 156; Matter of Gilman, 38 Barb. (N. Y.) 364; Will of Cohen, 1 Tucker 286 (N. Y.)

ment and it was so understood, not only by the testator, but by the witnesses as well. This conclusion of the court is supported by authorities from other jurisdictions in construing statutes similar to those of California⁹³ on this subject.

In a recent case,⁹⁴ the name of the testator was written a short distance below the body of the will. The witnesses afterwards inserted their signatures above that of the testator. The court held that the will was subscribed "at the end thereof" and that the relative positions of the witnesses' names and the testator's name were immaterial, since the statute does not require that the testator's signature shall occupy any specific place with reference to the signatures of the witnesses.

An attested will must be subscribed at the end thereof "by the testator himself or some person in his presence and by his direction must subscribe his name thereto." It is to be borne in mind that, for an attested will to be valid, whether it be subscribed by the testator himself or whether some person in his presence and by his direction subscribes his name for him, it must be subscribed "at the end." To those who cannot write is accorded the privilege of directing some other person, that he subscribe the testator's name to the instrument. This must be done in the presence of the testator⁹⁵ and the person who subscribes the testator's name, by his direction, must write his own name as a witness to the will. If, however, he does not write his own name as a witness to the will, its validity is not affected.⁹⁶ The subscription, therefor, by a witness to a will, of the name of the testator, made under his direction, in his presence and at his request, is a sufficient execution of the will, although the person signing his name omits to write his own name near the signature, as a witness to his signature.⁹⁷

The writing of the "name" is not essential to a "signing." "To sign an instrument or document is to make any mark upon it in token of knowledge, approval, acceptance or obligation. The signature is the sign thus made."⁹⁸ Ordinarily, when a person cannot write, he may sign or subscribe by making a mark and his name must be written near the mark by a person who must write his

⁹⁴ Estate of Dutcher (1916), 172 Cal. 488.

⁹⁵ Subd. 1, Cal. Civ. Code, § 1276.

⁹⁶ Cal. Civ. Code, § 1278; Estate of Toomes (1880), 54 Cal. 509.

⁹⁷ Estate of Langan (1887), 74 Cal. 353, 16 Pac. 188.

⁹⁸ Estate of Walker, *supra*, n. 2; Estate of Manchester, *supra*, n. 74.

own name as a witness; provided further, that when a signature is by mark, it must, in order that the same may be acknowledged or may serve as the signature to any sworn statement, be witnessed by two persons who must subscribe their own names as witnesses thereto.⁹⁹

Since a will need be neither acknowledged nor considered as a sworn statement, the proviso above noted has no application. But what can be said to be the effect when a testator subscribes the will by mark and his "name" is not written nearby by some other person? If a person subscribes the testator's name, by his direction, near the mark made by the testator, and then signs his own name as a witness to the will, Section 14 of the Civil Code is fully satisfied. If, however, the person so writing the testator's name does not add his own name as a witness to the will, the validity of the will is not affected.¹⁰⁰ Suppose the scrivener or a witness to the will does not write the testator's "name" any place upon the document and the testator merely "signs" by making a mark, is the will properly executed? This question has never been squarely decided by the Supreme Court.

Construing Sections 1276 and 1278 of the Civil Code together, it appears that an attested will "must be subscribed . . . by the testator himself or some person in his presence and by his direction must subscribe his name thereto" and "a person who subscribes the testator's name, by his direction, must write his own name as a witness to the will." While the Supreme Court has held¹ that "to subscribe is to attest or give consent or evidence knowledge by under writing, usually (but not necessarily) the name of the subscriber," we are inclined to the opinion that the evident intention of the legislature was to require that the "name" of the testator appear somewhere in the instrument, otherwise great difficulty might often result in identifying a certain document with a particular decedent.

With reference to wills, Section 14 of the Civil Code is superseded by Section 1278 of the Civil Code, in so far as it is inconsistent with it. The latter section, however, would have no application to the hypothetical case suggested, for the reason that the testator's name is assumed not to have been written by another. Under these circumstances, we believe that Section 14 of the Civil Code

⁹⁹ Cal. Civ. Code, § 14.

¹⁰⁰ Id., § 1278.

¹ Estate of Walker, *supra*, n. 2.

would apply,² and if a will were executed merely by mark and nothing more, and if the testator's name did not anywhere appear, the signing or subscription would be inadequate.

A case which comes nearest this question is the Estate of Guilfoyle,³ but the distinction to be noted is that, in this case, the name of the testatrix, appearing in the beginning of the document, was written by a person who signed as a witness. The instrument offered as the will of the deceased was written in pencil covering a single page of small note paper as follows:

August 29, 1891.

"I Bridget Guilfoyle, leave \$500 (five hundred dollars) for masses at St. Patrick; also want a nice funeral and all other expenses to be paid from what I leave, and the rest to my two nieces, Maria and Aggie Johnson, equally.

X

Ellen O'Connor.

Witness:—

Emma Endres.

Mary Daly."

The will appears to have been written by the witness Emma Endres at the request of the deceased. After it was written, the witness, Emma Endres, read the will to the deceased in the presence of the other subscribing witnesses. The deceased was then asked whether that was her will and she answered that it was. She was then given a pen by the witness Emma Endres and though the deceased knew how to write her name, she was physically too weak to do so. She made a cross at the end of the paper, and declared that such paper was her will and requested Emma Endres, Mary Daly and Ellen O'Connor to sign the same as witnesses. Under these facts, where the whole body of a will, including the name of the testatrix, was written by one who was a subscribing witness to the will, and the will was signed by a mark made by the testatrix, without repeating the name in immediate connection with the mark, the mark was held to be a sufficient signature under the terms of Section 14 of the Civil Code. The court suggested that the only object of Section 14 of the Civil Code in requiring that when a person who cannot write, signs an instrument by his mark, his name must be written near the mark, is to show what name the mark is intended to repre-

² See Estate of Dombrowski (1912), 163 Cal. 290, p. 296, in which the court declines to pass upon this point.

³ (1892), 96 Cal. 598, 31 Pac. 553.

sent, and if it clearly appears from the instrument what name the mark was intended to represent, it must be held to be sufficiently near the name.

In the Estate of Dombrowski,⁴ the document offered as the will of the decedent was typewritten in form and witnessed by three subscribing witnesses. At the time of the execution of the will, the deceased, unable to write her name by reason of illness, requested Maple, her legal advisor and one of the persons named as executors, to write her name. This he did, adding the words "her mark," as follows:

	her	
Fannie		Dombrowski
	mark	

Mrs. Dombrowski made a cross (x) in the space left between her given name and her surname, and the three witnesses signed the attestation clause and also signed their names under the words "witnesses to mark," which had also been written by Maple. Mr. Maple, however, did not write his own name on the paper as a witness or otherwise. The testimony indicated that the decedent requested the subscribing witnesses to sign as witnesses to her mark, as well as to become attesting witnesses to the will.

The court held that since it appeared that the name of the testatrix was subscribed by Mr. Maple, in her presence and at her direction, the requirements of Sections 1276 and 1278 of the Civil Code had been fully met and that the will was valid even though Mr. Maple did not sign his name as a witness.

The following quotations from the opinion bear upon the question last above discussed:⁵

"But the appellants argue that the decedent did not intend to perform the testamentary act by having her name written by another person; that what she in fact undertook to do was to sign her name by mark, and that such signing was incomplete and ineffectual for want of compliance with the requirement of section 14 of the Civil Code, that where a subscription is by mark, the name of the person so signing is to be written near the mark, by a person 'who writes his own name as a witness.' Here, as has been stated, the person (Maple), who wrote the name of Mrs. Dombrowski, did not write his own name as witness. While, accordingly, the writing of the testatrix's name by Maple would have been sufficient, if nothing more had been contemplated or done, yet where such

⁴ Estate of Dombrowski, *supra*, n. 2.

⁵ 163 Cal. pp. 293, 294.

writing was merely a step in an ineffectual attempt to sign by mark, there was, it is claimed, no completed subscription by either method. The subscription by mark was defective for want of the signing as witness by the person writing the name. The execution was not sufficient under section 1276, because the decedent never intended that the writing of her name by Maple, without the making of her mark, should complete her act of formal execution.

The argument thus advanced rests upon rather refined and technical reasoning. The testatrix unquestionably intended to execute a will, and performed certain acts in order to carry out this intent. She did everything necessary, under the statute, to a valid execution. Is her act to be overthrown because, in addition, she tried to do something more? All that was done—the direction to Maple to write her name, his writing of it, the making of a mark—taken together, formed a single transaction, every part of which was influenced by the one intent of executing a will. To say that the decedent intended to sign by mark, rather than under section 1276, is to lose sight of the real nature of her acts. What she intended was to execute a will. No doubt she thought that all of the acts performed were necessary, or at least proper, parts of a valid execution. But there is no good ground for saying that she intended that one of them, rather than another, should accomplish the desired end. Her intent was to carry out and authenticate her testamentary purpose by means of all these acts. The essential facts are that she did everything which she designed to do in executing her will, and that what she did included the formalities required by the statute for such execution. This being so, the validity of that which was rightly done is not affected by the circumstance that she may have entertained and acted upon the belief that something more was needed. . . .”

“We have assumed,⁶ in the foregoing discussion, that the undisputed evidence shows, as appellants contend, that the decedent contemplated making her mark when she directed the writing of her name, and that she did not intend that execution should be complete until all of the acts—the writing of her name by Maple, the making of a mark by herself, and the witnessing of her mark by the three who did witness it—should be accomplished. We have also assumed that the provision of section 14, requiring one who writes the name of a person signing by mark to write his own name, is applicable to the execution of wills. Both points are disputed by the respondents, but we think it unnecessary to express an opinion upon either. We prefer to rest our decision on the broad proposition that there is a valid execution where a person

⁶ 163 Cal. p. 296.

undertaking to make a will has done certain acts with the intention of thereby executing his will, leaving undone nothing which he undertook to do to carry out that intention, and the acts done include everything necessary, under our statutes, to the execution of a will."

VIII.

The subscription of a will by the testator or by some person in his presence and by his direction, must be made in the presence of the attesting witnesses, or, if this is not done, it is sufficient if the testator acknowledges to the witnesses that the subscription was made either by him or by his authority.⁷

It is immaterial whether the testator signs his name before or after the witnesses sign their names to the document executed as a will, so long as it appears that all of the parties signed it at the same time and as part of the same transaction. "The statute," the court said, "does not" make the order of signing material.⁸

We can hardly subscribe to this construction of the statute. The natural and logical sequence of events in the execution of a will is, first, the execution by the testator, and, next, the attestation by the witnesses. That the legislature had this sequence in mind is evidenced by the order in which the words and provisions of Section 1276 of the Civil Code appear "Every will . . . must be executed and attested as follows". It is to be noted that the word "executed" appears before the word "attested". There are four subsections of Section 1276 of the Civil Code. The first three subsections refer to the execution of the will by the testator, while the last subsection refers to the attestation by the witnesses. Does this not clearly indicate that the execution by the testator was intended to precede the attestation by the witnesses?

It is anomalous to say that the witnesses may attest the will by signing it before the testator executes the same. If they do, what are they attesting? The very term "attestation" or "attest" means: "to certify", "to affirm to be true or genuine" "to see a writing executed or hear it acknowledged, and at the request of the party to sign the name as a witness".^{8a} If, therefore, there has been no execution or acknowledgment by the testator, how can there be an attestation by the witnesses? Is it not

⁷ Subd. 2, Cal. Civ. Code, § 1276.

⁸ Estate of Silva, *supra*, n. 26.

^{8a} Vol. I Words and Phrases 628.

violating the intention of the legislature and the language of the statute, and is it not dangerous, to excuse an improper sequence of acts concerning the execution of wills by saying that the execution is valid "so long as it appears that all of the parties signed it at the same time and as part of the same transaction"?

The acknowledgment of a signature by a testator is not required to be made in any particular words or in any specified manner; but if by sign, motion, conduct or attending circumstances, the attesting witnesses are given to understand that the testator has already subscribed the instrument, this is a sufficient acknowledgment.⁹

In an early case,¹⁰ the deceased was an unlettered man, being able neither to read nor write. At his request, a friend, using a printed blank, filled out a paper intended for a will. It was prepared under the deceased's immediate supervision and according to his instructions. After keeping it about three weeks, the deceased desired to have it executed and requested his friend to write his (the deceased's) name at the foot of the paper. The deceased made a cross at the end of his name. Some two or three days after that, the deceased and his friend, knowing that it was necessary to have two witnesses, went to a neighbor's house and found two acquaintances. The deceased produced the paper from his pocket and said to the persons, "I want you to witness my will." The paper was placed on the table and both witnesses signed the printed attesting clause. The deceased did not say anything about his signature, or his mark, or about his having had his name signed. The name of the friend who signed the deceased's name does not appear on the paper. The court held that under Section 1278,¹¹ the fact that the deceased's friend did not add his name did not invalidate the will. The court, however, held that the subscription of the will had not been acknowledged by the testator and for that reason was invalid. The court pointed out that the testator should have called the attention of the witnesses to the fact that he had signed the document and that it had been subscribed either by him or by someone else, under his authority.

IX.

The testator must, at the time of subscribing or acknowledging

⁹ Estate of Williams (1895), 5 Coffey's Prob. Dec. 1.

¹⁰ Estate of Taney (1878), Myricks Prob. Rep., 210.

¹¹ Cal. Civ. Code, § 1278.

his will, declare to the attesting witnesses that the instrument is his will.¹² It is not necessary that the testator should speak words, declaring a document to be his will. It is sufficient if this declaration is unmistakably indicated to the persons signing as witnesses, by the testator's conduct and actions, although there is no declaration in words to that effect.¹³

In the *Estate of Fusilier*,¹⁴ a paper was offered for probate as the last will of the deceased. The instrument was prepared by an attorney, at the request of a friend of the deceased. This friend, employed in a bank, arranged to have the will executed at the bank. The paper was placed on the counter before the deceased and his friend pointed out to him the place to sign. The deceased signed at the place indicated, and his friend then turned to the witnesses, and requested them to sign, pointing to the places for their signatures. The witnesses signed as requested. Both of the witnesses saw the deceased sign the instrument and he saw them sign it. Both witnesses were sworn and both testified that the deceased made no declaration or said anything of consequence with reference to the document as a will; there was no declaration made in words by the deceased, or by any other person, that the instrument was a will. The court denied probate to the instrument on the ground that there had been no declaration to the attesting witnesses that the instrument was his will. The court said:

The declaration may be by words or acts; it may be done by the testator in person or by some person, in his presence and by his authority, but in some way, and at the time, the witnesses must be informed by the testator that he wishes them to understand that the paper is executed as his will. A mere tacit signing by the testator with attestation by the witnesses is not enough."

Although it is necessary that there be a declaration to the witnesses, in some form, that the instrument is a will, it is not necessary to the validity or due execution and publication of a will that the subscribing witnesses or any of them should be informed of or have any knowledge whatever of the contents of the document.¹⁵

¹² Subd. 3, Cal. Civ. Code, § 1276.

¹³ *Estate of Silva*, *supra*, n. 26; *Estate of Cullberg* (1915), 169 Cal. 365, 146 Pac. 888.

¹⁴ (1873), Myr. Prob. 40.

¹⁵ *Estate of McGinn* (1889), 3 Coffey's Prob. Dec. 26.

X.

In an attested will, there must be two attesting witnesses, each of whom must sign "the same" as a witness, at the end of the will, at the testator's request and in his presence.¹⁶

Prior to 1905, the code section provided that each witness must sign "his name." An amendment was passed¹⁷ changing "his name" to "the same," in order to avoid a certain construction which the Supreme Court had given to the section and which will be noted hereafter.¹⁸ However, Section 1278 of the Civil Code was permitted to remain as it was, providing that a witness to a written will must write with his name, his place of residence.

Before construing the language of Subdivision 4, Section 1276 of the Civil Code, there are other sections which should be borne in mind.

A witness to a written will must write, with his name, his place of residence; but a failure to do this will not affect the validity of the will.¹⁹ All beneficial devises, legacies and gifts whatever, made or given in any will to a subscribing witness thereto, are void unless there are two other competent subscribing witnesses to the same; but a mere charge on the estate of the testator for the payment of debts, does not prevent his creditors from being competent witnesses to his will.²⁰ If a witness to whom a void beneficial devise, legacy or gift, is made, would have been entitled to any share of the estate of the testator, in case the will should not be established, he succeeds to so much of the share as would be distributed to him, not exceeding the devise or bequest made to him in the will.²¹

While there may be more than two subscribing witnesses to an attested will,²² there can not be less than two. A subscribing witness is one who sees the writing executed or hears it acknowledged, and thereupon signs his name as a witness at the maker's request and in his presence.²³

Although it is customary, usual, and perhaps advisable, for

¹⁶ Subd. 4, Cal. Civ. Code, § 1276.

¹⁷ Stats. 1905, p. 605.

¹⁸ Estate of Walker, *supra*, n. 2.

¹⁹ Cal. Civ. Code, § 1278.

²⁰ Id., § 1282.

²¹ Id., § 1283.

²² Estate of Dombrowski, *supra*, n. 2.

²³ Estate of Blythe (1889), 4 Coffey's Prob. Dec. 445.

an attested will to have an attestation clause,²⁴ it is not essential to its validity that there be an attestation clause.²⁵

It is not even necessary that the witnesses sign the instrument "as witnesses." The mere signing of their names, without designating that the signing is made "as witnesses," will be regarded as sufficient.²⁶

It is not necessary that the testator should speak words expressly requesting the witnesses to sign the will. It is sufficient if this request is unmistakably indicated to the persons signing as witnesses, by the testator's conduct and actions, although there is no request in words to that effect.²⁷

While the request to a witness to sign his name to a will should come from the testator and not from a third person,²⁸ yet the request is unquestionably good if it is made by a third person, provided the testator understands the matter and acts in accordance with the making of the request.²⁹

In the Estate of Tyler,³⁰ the concluding part of the instrument offered as the will of the deceased, was as follows:

"In witness whereof I have hereunto set my hand and seal in the presence of John Heard and, who I request to sign their names hereto as subscribing witnesses.

(Signed)

"John Heard

(Signed) Anna Foster (Seal.)

"Fred B. Berger"

The signature of the testatrix was proved. The attesting witness Heard was dead and his signature was proved. The witness Berger testified that although he remembered signing the will and

²⁴ The form usually used is as follows:

"The foregoing instrument, consisting of pages, including this, was signed and subscribed by, the person therein named as testator, at the City of, County of, State of California, on the day of in the year, in the presence of us, all being present at the same time, and was, at the time of his so subscribing the same, acknowledged and declared by him to us, to be his last will and testament, and thereupon we, at his request, in his presence, and in the presence of one another, have subscribed our respective names as witnesses thereto, to which we have added our respective residences."

²⁵ Estate of Kent (1911), 161 Cal. 142; Estate of Crittenden (1873), Myricks Prob. Rep. 50; Estate of Hartter, *supra*, n. 92; Estate of Fallon (1886), 5 Coffey's Prob. Dec. 426.

²⁶ Estate of Kent, *supra*, n. 25.

²⁷ Estate of Silva, *supra*, n. 26; Estate of Cullberg, *supra*, n. 13; Estate of Fallon, *supra*, n. 25; Estate of Crittenden, *supra*, n. 25.

²⁸ Estate of Thompson (1894), 3 Coffey's Prob. Dec. 357.

²⁹ Estate of Crittenden, *supra*, n. 25.

³⁰ (1898), 121 Cal. 405.

swore to his signature, he had no definite recollection of certain things which occurred at the time he attested the will. He could not remember whether the testatrix actually signed the instrument or verbally acknowledged her signature to it in his presence, or whether she declared the document to be her will in the presence of the attesting witnesses, or whether she requested him to sign as an attesting witness. He did not testify, however, that these things were not done, nor was there any evidence to impeach the execution of the will or to throw upon it a shadow of any kind of suspicion. The court held that the will was properly executed and said:

"While the code provides that certain things are necessary to the making of a valid will, it does not prescribe how those things shall be proven; it leaves that to the general rules of evidence. . . . But there is no statutory declaration and no principle of law to the effect that a will executed in due form shall go for naught unless an attesting witness after the lapse of many years shall continue to recollect everything material that occurred at the time he subscribed his name to it."³¹

Each of the subscribing witnesses must sign the will in the presence of the testator. While the statute does not, in so many words, prescribe that the witnesses sign the will in the presence of each other, yet the approved practise of execution is that the will be signed by each of the witnesses, not only in the presence of the testator, but in the presence of each other as well. This "approved practice of execution" has recently received judicial sanction in the *Estate of Emart*,^{31a} wherein, we are frank to confess, the dissenting opinion of Mr. Justice Sloss seems to be better reasoned than the prevailing opinion. In making this comment, we do not desire to subscribe to the advisability of the rule suggested by Mr. Justice Sloss, but rather to the correctness of his conclusions construing the statutes of California.

In the *Estate of Emart*, one of the attesting witnesses attested the will in the forenoon of the day upon which it was executed, and the other attesting witness attested it in the afternoon. The witnesses did not sign their names or attest the will in the presence of each other. The testatrix subscribed her will in the pres-

³¹ The final decision of the Supreme Court in this case is erroneously reported in 50 Pac. 927 and 5 Cal. Unrep. Cases 851.

^{31a} (June 1, 1917), 53 Cal. Dec. 691, 165 Pac. 707.

ence of one of the witnesses and acknowledged her subscription to the other attesting witness. It is the aim of the prevailing opinion to show, from the language of our statute and the history of legislation upon the subject of wills, that the subscription or acknowledgement by the testator must be before the two witnesses present at the same time. Until changed by legislation or judicial decision this is now the rule in California.

While this rule is, indeed, a good one, we do not believe that the language of the statute warrants its adoption. Subdivision 4 of Section 1276 of the Civil Code provides that "there must be two attesting witnesses, each of whom must sign the same as a witness, at the end of the will, at the testator's request and in his presence." It does not provide that the witnesses sign "in the presence of each other" or "at the same time." Courts are not justified, as suggested by the dissenting opinion, "in reading into the law a demand for the performance of any act or formality not included within its terms."

It is true, as suggested by the prevailing opinion, that "if the will is acknowledged to the one witness on one day and to the second witness months, or even years, thereafter, both witnesses will not be witnessing or attesting under the same state of facts, that is to say, neither witness could declare that at the time the other witnessed it, the testator was apparently free from duress, menace or undue influence, and was of sound and disposing mind." Nevertheless, the rule depends not upon policy, but upon statutory interpretation. While it is undoubtedly advisable that a will be subscribed or attested in the joint presence of the witnesses, yet the necessity for the joint presence of the witnesses during any part of the testamentary act should be held to exist "only when the statute contains direct and explicit language to that effect. . . . when it declares that the signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time." We feel that, in announcing the rule, the majority of the court read into the statute a demand for the performance of an act or formality not now included within the terms of the statute.

"In the presence of the testator" has been construed to mean that the testator must not only be present physically but mentally, in order that there be an appreciation of the acts taking place before him.³² Where the instrument was signed by the subscrib-

³² Estate of Fleishman (1892), 1 Coffey's Prob. Dec. 18.

ing witnesses in an apartment adjoining the room in which the testatrix was lying ill upon her bed, beyond the sight or hearing of the testatrix, the court held, that the will was not attested "in the presence of the testator."³³

The witnesses must sign "at the end of the will." The construction of the requirement of the testator subscribing the will "at the end," is applicable to the signing by the witnesses. It has been decided³⁴ that a will is valid where witnesses sign and insert their names above that of the testator, who had signed his name a short distance below the body of the will. If a testator subscribes his name "at the end" but the witnesses do not sign "at the end," then the instrument is improperly executed.

If a subscribing witness cannot write, he may sign by making a mark, provided that his name is written near the mark by a person who writes his own name as a witness thereto.³⁵ In the *Estate of Derry*,³⁶ one of the witnesses to the will, could not and did not write his name. The other witness, besides signing as a witness to the will, wrote the name of his associate witness and wrote his own name as a witness to the mark of the associate. The court held that this was a good witnessing of the will.

Prior to the amendment of 1905,³⁷ the statute provided that "there must be two attesting witnesses, each of whom must sign his name as a witness" etc. With the statute in this condition, an instrument was offered for probate as a will,³⁸ wherein one witness, Joseph P. Jones, wrote his name in full. The other witness, William H. Ford, wrote the abbreviation "Wm." and the first down stroke of the initial "H." There the signing stopped, as if the ink ceased to flow. The court held, that the will was insufficiently executed for the reason that the witness Ford had not signed "his name" as a witness. No person could tell, the court suggested, from an examination of the paper, whether the name of the witness was "William H. Ford, or William H. Smith, or William H. anything. The word Ford is an essential part of the witness' name."

In a later case,³⁹ the will of the deceased was written by Mr.

³³ *Estate of Fleishman*, *supra*, n. 32.

³⁴ *Estate of Dutcher*, *supra*, n. 94.

³⁵ Cal. Civ. Code, § 14.

³⁶ (1878), Myr. Prob. 202.

³⁷ Stats. 1905, p. 605.

³⁸ *Estate of Winslow* (1876), Myr. Prob. 124.

³⁹ *Estate of Walker*, *supra*, n. 2.

Warren, his attorney, and was executed in the presence of Mr. White and Mr. Warren who were requested by the testator to attest, as witnesses to its execution. The requirements of the statute were complied with in all respects, saving as to the witness C. G. Warren, who in signing his name as a witness at the end of the will, inadvertently wrote the name "C. G. Walker," thus employing his own initials but the testator's surname. The court held that the witness had not attached his own name to the will as a witness and it was therefore insufficiently executed. The court said:

"I conclude therefore, that as our law has seen fit to prescribe that the testator shall subscribe his will at the end thereof, so it has seen fit to require that attesting witnesses shall sign and shall sign only in one way, that is to say, by affixing their names."

In order to avoid this technical and strict construction which the court placed upon the language of subdivision 4 of Section 1276 of the Civil Code, the words "his name" were changed to read "the same." It is now necessary, under this section, for a witness merely to sign the instrument even though Section 1278 of the Civil Code still indicates that a witness should sign "his name." However, it is to be borne in mind that a violation of Section 1278 of the Civil Code "does not affect the validity of the will."

"To sign," has been held⁴⁰ to mean the making of any mark.

"To sign an instrument or document is to make any mark upon it in token of knowledge, approval, acceptance, or obligation. The signature is the sign thus made. And while, by long usage and custom, signature has come generally to mean the synonym of autograph, that signification is derivative, and is not inherent in the word itself any more than it is in autograph, which strictly conveys no more than the idea of a specimen of an individual's writing.

Any mark may be a signature, and that species of mark which we call a cross (independent of an accompanying name) was early used as a signature of assent, and indeed was designated *signum*."

The required formalities surrounding the execution of attested wills seem to be well defined and are readily susceptible of precise compliance. The dissemination of these formalities, together with what has definitely been regarded by our Supreme

⁴⁰ Estate of Walker, *supra*, n. 2.

Court as satisfying the requirements of an olographic will, should be helpful in avoiding contests entered against the probate of documents as wills, upon the ground of the lack of their due execution and attestation by the decedent or subscribing witnesses.

Nat Schmulowitz.

San Francisco, California,
March, 1917.